

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

RICHARD SCOTT SHAFER,

Plaintiff,

v.

BRYAN COLLIER, et al.,

Defendants.

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Case No. 6:19-cv-114-JDK-KNM

**ORDER ADOPTING REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE**

Plaintiff Richard Scott Shafer, an inmate proceeding pro se, filed this civil rights lawsuit pursuant to 42 U.S.C. § 1983. The case was referred to United States Magistrate Judge K. Nicole Mitchell pursuant to 28 U.S.C. § 636.

Plaintiff's complaint raises several claims against several different defendants. Defendant Lieutenant Joseph Embra has moved to dismiss the claims against him arguing that Plaintiff did not show any harm resulting from Defendant Embra's actions. Docket No. 74. Defendant Embra further invoked his entitlement to qualified and Eleventh Amendment immunity and contended that Plaintiff's pleadings as to him were conclusory and failed to state a claim upon which relief may be granted. *Id.*

After reviewing the pleadings and briefing on the motion, the Magistrate Judge issued a Report recommending that the Court grant Defendant Embra's motion to dismiss. Docket No. 102. The Magistrate Judge observed that Plaintiff's claims

against Defendant Embra were based on *respondeat superior* liability, but Plaintiff failed to allege facts showing that Defendant Embra affirmatively participated in acts causing a constitutional injury or implemented unconstitutional policies or customs resulting in a constitutional injury. *Id.* at 6. The Magistrate Judge also held that Defendant Embra’s alleged threatening statements—that he would beat Plaintiff if Plaintiff did not address him as “sir”—did not amount to constitutional violations. *Id.* at 7.


Plaintiff objected to the Magistrate Judge’s Report arguing that Defendant Embra’s threats constituted assault, resulting in a constitutional violation, and that Embra is culpable in his supervisory capacity. Docket No. 112. Concerning Defendant Embra’s supervisory role, the Magistrate Judge correctly determined that supervisory liability, or *respondeat superior*, does not generally apply in § 1983 lawsuits; rather, a supervisor may be held liable if he affirmatively participates in the acts causing a constitutional deprivation or implements unconstitutional policies which causally result in the constitutional injury. *Porter v. Epps*, 659 F.3d 440, 446 (5th Cir. 2011). And, outside of the alleged threats made by Defendant Embra, Plaintiff offered no facts showing that Defendant Embra affirmatively participated in acts causing a constitutional deprivation or implemented any unconstitutional policies. Concerning Defendant Embra’s alleged threats to beat Plaintiff, the Magistrate Judge correctly held that “mere threatening language and gestures of a custodial office do not, even if true, amount to constitutional violations.” *Wallace v.*

Owens, 48 F. App'x 105, 2002 WL 31017224 (5th Cir. Aug. 21, 2002) (quoting *McFadden v. Lucas*, 713 F.2d 143, 146 (5th Cir. 1983)).

Having conducted a careful de novo review of those portions of the Magistrate Judge's proposed findings and recommendations to which the Plaintiff objected, the Court has determined that the Report of the Magistrate Judge is correct, and the Plaintiff's objections are without merit. *See* 28 U.S.C. § 636(b)(1) (District Judge shall "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.").

Accordingly, the Court hereby **OVERRULES** Plaintiff's objections and **ADOPTS** the Magistrate Judge's Report (Docket No. 102) as the opinion of this Court. The Court **GRANTS** Defendant Embra's motion to dismiss (Docket No. 74), and the claims against Defendant Embra are **DISMISSED WITH PREJUDICE**. Lieutenant Joseph Embra is **DISMISSED** as a party to this lawsuit. This dismissal shall have no effect upon the remaining claims and Defendants in this case.

So **ORDERED** and **SIGNED** this **2nd** day of **December, 2020**.



JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE